No. 990

In the Supreme Court of the United States

OCTOBER TERM, 1944

CLARENCE CROMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

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OPINION BELOW

The opinion of the court of appeals (R. 104–106) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered March 20, 1944 (R. 107), and a petition for rehearing (R. 108–113) was denied April 7, 1944 (R. 114). The petition for a writ of certiorari was filed May 10, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a material variance between the charges of the indictment and the Government's proof.

2. Whether Counts 1, 3, 5, 7 and 9 fail to state offenses under Section 2554 (a) of the Internal Revenue Code. This depends on whether the Commissioner of Internal Revenue possesses the authority to issue order forms for the purchase of narcotics.

3. Whether the court committed reversible error in refusing to declare a mistrial because two narcotic agents who were government witnesses discussed, during a recess in the trial, certain evidence in the case, although the court at the beginning of the trial had directed that all witnesses be separated.

4. Whether the court committed reversible error in admitting in evidence a box, the ownership of which petitioner denies, which was taken without a search warrant from a shed on premises adjoining petitioner's.

5. Whether the sentences imposed on petitioner are ambiguous and whether they constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

STATUTES I VOLVED

The Act of February 9, 1909, 35 Stat. 614, as amended, 21 U. S. C. 174, provides in part:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 2553 of the Internal Revenue Code (26 U. S. C. 2553) provides in part:

> (a) * * * It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by

> the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Section 2554 of the Internal Revenue Code (26 U. S. C. 2554) provides in part:

> (a) * * * It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary [of the Treasury].

STATEMENT

On November 30, 1942, petitioner was indicted in the United States District Court for the District of Columbia in twelve counts charging violations of the Harrison Narcotic Act (26 U. S. C. 2553, 2554) and the Narcotic Drugs Import and Export Act (21 U. S. C. 174) (*supra*) (R. 1–5). Counts 1, 3, 5, 7, and 9 charged that on various specified occasions he wilfully sold to one Rufus Ford certain quantities of a derivative of opium, viz., heroin hydrochloride, not in pursuance of written orders from Ford on forms issued for that purpose by the Commissioner of Internal Revenue

(R. 1–4). Counts 2, 4, 6, 8, 10, and 12 charged that on specified occasions he fraudulently and knowingly received, concealed, bought, sold, and facilitated the transportation and concealment of quantities of heroin hydrochloride knowing that it had been illegally imported into the United States (R. 2–5). The eleventh count charged that he wilfully purchased a specified quantity of heroin hydrochloride which was not then in original stamped packages, nor from original stamped packages (R. 5).

Petitioner was found guilty by the jury on all counts (R. 7) and he was sentenced to imprisonment "for the period of Forty (40) months to Ten (10) years and [to] pay a fine of Five Thousand ($5,000.00) Dollars on count two; and Forty (40) months to Ten (10) years on each of counts four, six, eight, ten, and twelve, each count to run concurrently and concurrently with count two; and Twenty (20) months to Five (5) years on count one, to take effect at expiration of sentence imposed on count two; and Twenty (20) months to Five (5) years on each of counts three, five, seven, nine, and eleven, each count to run concurrently and concurrently with sentence imposed on count one; * * *" (R. 11–12). Upon appeal to the Court of Appeals for the District of Columbia the judgment was affirmed (R. 107).

The evidence adduced at the trial in support of counts 1 to 10 related to petitioner's possession and

sale of various quantities of narcotics on five different occasions. The Government's evidence in respect of counts 1 and 2, which is illustrative of all the evidence under the first ten counts of the indictment, may be summarized as follows:

On August 24, 1942, Rufus Ford, a paid informer of the Bureau of Narcotics of the Treasury Department, was advised by petitioner that if he wanted any heroin, he had "some pretty good stuff." Two days later, working in cooperation with Government narcotic agents, Ford went to petitioner's home and told him that he wanted to get an ounce of "stuff." Petitioner told him he would sell him a little less than one ounce for $35, and he delivered an envelope to Ford in return for payment of $35. In respect of this transaction Ford testified, "I took the envelope from the defendant and gave him $35.00 and I did not give the defendant any order form or written order issued by the Commissioner of Internal Revenue or any other person". Immediately after leaving petitioner's home, Ford surrendered the envelope to the Government agents. (R. 28–30.) Upon chemical examination it was found to contain 289.6 grains of a mixture of heroin hydrochloride and cane sugar. Of the entire quantity, 4.29 grains was heroin hydrochlorine and the remainder was cane sugar, apparently used as a filler. (R. 39.)[1]

[1] Heroin hydrochloride is a derivative of opium. Since the mixture was only mechanical, the mixture of cane sugar and heroin did not destroy the identity of the latter (R. 39).

The evidence in respect of counts 11 and 12, charging petitioner with having purchased and concealed 2,705 grains of heroin hydrochloride which had been illegally imported into this country, and which was not in the original stamped packages, nor from them, shows that on September 24, 1942, narcotic agents and local police went to petitioner's home to arrest him. As they entered his premises they observed petitioner in his backyard throwing something which "looked like trash" into the air. Immediately thereafter the agents found a blue stationery box with a rubber band around it on the roof of a shed on the premises adjoining petitioner's; the box contained several spoons and eight small envelopes, each of which contained a white powdered substance. Neither the box nor the envelopes had revenue stamps on them. (R. 68–70, 71–75, 76–78.) The envelopes were found upon analysis to contain a total of 2,705 grains of heroin hydrochloride and milk sugar which had been mechanically mixed together, but neither of which had lost its identity (R. 78). Ford had earlier testified that when he dealt with petitioner, the latter obtained the heroin which he sold him from a "bluish" cardboard box about the size of a writing paper box which had a rubber band around it, and that he had observed several envelopes and spoons in the box (R. 51, 66). Although Ford was unable positively to identify the box which the agents found as the one which he had observed in petitioner's

home, he testified that it looked like that box (R. 66–67).

Petitioner did not offer any testimony in his own defense, but, instead, rested at the conclusion of the Government's case (R. 82).

ARGUMENT

Petitioner asserts five grounds of alleged error, none of which, we submit, has any merit.

1. The fact that the indictment identified the narcotic as heroin hydrochloride and the proof showed that the substance which petitioner sold as heroin was a mechanical mixture of heroin hydrochloride and sugar does not, as petitioner contends (Pet. 2, 15–16, 23–25), establish a material variance. The testimony of the government chemist Spear showed that, despite the mixture, the narcotic retained its identity and was separable from the sugar (R. 39, 78). In these circumstances it is plain that petitioner dealt in heroin as charged in the indictment; the fact that he also sold sugar as heroin is of no significance. Contrary to petitioner's assertion (Pet. 15–16, 24), the decision below is not in conflict with *Guilbeau* v. *United States,* 288 Fed. 731 (C. C. A. 5), or *Coleman* v. *United States,* 26 F. (2d) 870 (C. C. A. 8). For in those cases a fatal variance was found to exist in the fact that the indictment specified a different drug than that which was proved at the trial. In the instant case no such inconsistency exists.

Similarly, there is no fatal variance in the fact that the proof did not show the same number of grains of the narcotic as the indictment alleged. Since petitioner was selling a mixture of heroin hydrochloride and sugar as heroin, it was peculiarly within his own knowledge that the quantities of the mixture traced to him and charged in the indictment were not exclusively heroin hydrochloride. Plainly, the variance was insignificant and subjected petitioner to no surprise at the trial. *Berger* v. *United States,* 295 U. S. 78, 82.

2. In reliance on *Fleisher* v. *United States,* 302 U. S. 218, petitioner further contends (Pet. 3, 16–18, 25–27) that counts 1, 3, 5, 7, and 9 fail to state an offense under Section 2554 (a) of the Internal Revenue Code (*supra,* p. 4), because each charges that the sale of the narcotic was not made in pursuance of a written order of the purchaser on a form "issued in blank for that purpose by the Commissioner of Internal Revenue," whereas legal authority to issue such forms is vested in the Commissioner of Narcotics. In rejecting this contention the court below properly held (R. 105) that pursuant to the applicable statutes and Treasury regulations the power to prescribe order forms has been delegated to the Commissioner of Narcotics and that authority to issue such forms is vested in the Commissioner of Internal Revenue. The court below cited as authority for its holding on this point the un-

reported order of the Circuit Court of Appeals for the Sixth Circuit in *Nailling* v. *United States,* decided February 9, 1942.[2] On petition for certiorari in the *Nailling* case the same contention as petitioner here urges was raised, and this Court denied the petition. 316 U. S. 675, No. 1042, October Term, 1941.[3] Since the Commissioner of Internal Revenue possessed the necessary authority to issue the forms the *Fleisher* decision obviously is not in point.

3. Petitioner argues (Pet. 3, 12–13, 18, 28–29) that the trial court should have declared a mistrial when it appeared that, contrary to the court's order separating the witnesses (R. 28), Government witness Trigstead, a narcotic agent who had previously testified concerning a safe in the Narcotic Bureau's office, asked another agent during

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[2] The order in the *Nailling* case reads in pertinent part as follows:

"And it appearing that while the indictment charges that the sale of morphine sulphate was not made in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, and Section 2554 (a) requires that the order be written on "a form to be issued" by the Secretary of the Treasury, the Secretary is authorized by statute to delegate and has delegated authority to the Commissioner of Internal Revenue to issue such order forms. Act of March 3, 1927 [44 Stat. 1381, Sections 4 (a) and 4 (b)]; Treas. Dec. No. 3999, issued March 18, 1927; Treas. Dec. No. 1 (Bureau of Prohibition), issued April 1, 1927; Act of June 14, 1930 [46 Stat. 585, Section 3 (b)]; Treas. Dec. No. 2 (Bureau of Narcotics), issued July 1, 1930; Section 2606, Title 26, I. R. C.; Treas. Dec. No. 4884, issued February 11, 1939; * * *"

[3] The relevant statutes and regulations are discussed in the Government's brief in opposition in that case.

the noon recess what persons had access to the safe (R. 46–47). When the incident was brought to the attention of the court, it cautioned the witness against repeating such conduct, but denied petitioner's motion for a mistrial (R. 47). At the time of the occurrence the trial was well under way; the discussion among the agents related to a question of fact which was of little significance at the trial; and the incident was known to the court and the jury and could be considered by them in weighing agent Trigstead's testimony. In the circumstances, petitioner having made no showing of prejudice, it is clear that the trial court did not abuse its discretion in refusing to declare a mistrial.

4. Petitioner contends (Pet. 3, 14, 18–19, 29–32) that the blue stationary box containing heroin hydrochloride which the arresting officers found on his neighbor's property (*supra*, p. 7) was improperly received in evidence, because it was obtained by an illegal search and seizure. In the first place, however, since petitioner denies that the box was his (Pet. 30–31) and the evidence shows that it was taken from the roof of a shed located on another's premises, he has no status to complain of the manner in which the box was obtained. *Kitt* v. *United States*, 132 F. (2d) 920, 921–922 (C. C. A. 4); *United States* v. *Feldman*, 104 F. (2d) 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; cf. *Goldstein* v. *United States*, 316 U. S. 114, 121; *Perlman* v. *United States*, 247

U. S. 7, 13–15. Secondly, petitioner made no effort to have the evidence suppressed before trial, nor did he at the trial offer any excuse to the court for his failure to do so. Instead, he simply objected to testimony relating to the entry "in defendant's home or upon his premises * * * on the ground that * * * no warrant of arrest had been obtained for defendant, and that no search warrant had issued authorizing the search of defendant's premises or his home" (R. 71, 81). In these circumstances his objection was properly overruled. *Segurola* v. *United States,* 275 U. S. 106.[4] Moreover, the evidence to which petitioner objects relates only to counts 11 and 12 and the sentences imposed on those counts were ordered to run concurrently with the sentences on counts 1 and 2; consequently it is unnecessary to consider the validity of the convictions on these counts in order to sustain the judgment. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105, and cases cited.

5. Petitioner's contention (Pet. 4, 14, 19, 32-34) that the judgment (*supra,* p. 5) is ambiguous, because the court in imposing the sentences under counts 4, 6, 8, 10 and 12 ordered "each count to run concurrently and concurrently with count 2" and in imposing the sentences under

[4] Since the box in question was not taken from petitioner's premises, it would appear that even his objection at the trial was insufficient to raise any question of unlawful search and seizure.

counts 3, 5, 7, 9 and 11 ordered "each count to run concurrently and concurrently with sentence imposed on count 1", is frivolous. Obviously the failure of the court to use the terminology "the *sentence* on each count to run concurrently," as petitioner suggests, does not divest the judgment of its clear meaning. Equally frivolous is petitioner's contention (Pet. 32–34) that the sentences totalling 5 to 15 years' imprisonment for twelve offenses constitute cruel and unusual punishment. The sentences were well within the maximum which might have been imposed under the twelve counts. (21 U. S. C. 174, *supra*, p. 3; 26 U. S. C. 2557 (b) (1).)

CONCLUSION

The case was correctly decided below and there is no conflict of decisions. We therefore respectfully submit that the petition for certiorari should be denied.

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